

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL MALOTT #467434,

Plaintiff,

Hon. Paul L. Maloney

v.

Case No. 1:18-cv-62

LARRY WEAVER, et al.,

Defendants.

REPORT AND RECOMMENDATION

This matter is before the Court on Defendants' Motion for Summary Judgment. (ECF No. 59). Plaintiff initiated this action alleging numerous violations of his First Amendment rights. At this juncture, the only claims remaining are that, on November 16, 2016, Defendants Larry Weaver and Gary Blow searched Plaintiff's cell and confiscated legal documents and writing materials in retaliation against Plaintiff for filing various lawsuits. (ECF No. 12, 54-55). Defendants Weaver and Blow now move for summary judgment. Plaintiff has failed to respond to the present motion. Pursuant to 28 U.S.C. § 636(b)(1)(B), the undersigned recommends that Defendants' motion be granted and this matter terminated.

SUMMARY JUDGMENT STANDARD

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party moving for summary judgment can

satisfy its burden by demonstrating “that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.” *Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005). Once the moving party demonstrates that “there is an absence of evidence to support the nonmoving party’s case,” the non-moving party “must identify specific facts that can be established by admissible evidence, which demonstrate a genuine issue for trial.” *Amini v. Oberlin College*, 440 F.3d 350, 357 (6th Cir. 2006).

While the Court must view the evidence in the light most favorable to the non-moving party, the party opposing the summary judgment motion “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Amini*, 440 F.3d at 357. The existence of a mere “scintilla of evidence” in support of the non-moving party’s position is insufficient. *Daniels v. Woodside*, 396 F.3d 730, 734-35 (6th Cir. 2005). The non-moving party “may not rest upon [his] mere allegations,” but must instead present “significant probative evidence” establishing that “there is a genuine issue for trial.” *Pack v. Damon Corp.*, 434 F.3d 810, 813-14 (6th Cir. 2006).

Moreover, the non-moving party cannot defeat a properly supported motion for summary judgment by “simply arguing that it relies solely or in part upon credibility determinations.” *Fogerty v. MGM Group Holdings Corp., Inc.*, 379 F.3d 348, 353 (6th Cir. 2004). Rather, the non-moving party “must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and. . .may not merely recite the incantation, ‘Credibility,’ and have a trial on the hope that a jury may disbelieve factually uncontested proof.” *Id.* at 353-54.

In sum, summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Daniels*, 396 F.3d at 735.

ANALYSIS

To prevail on his retaliation claims, Plaintiff must satisfy three elements: (1) he was engaged in constitutionally protected conduct; (2) a defendant took adverse action against him which would deter a person of ordinary firmness from continuing to engage in protected conduct; and (3) the adverse action was motivated by Plaintiff’s protected conduct. *See Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010).

With respect to causation, courts recognize that retaliation is easy to allege and “is often very difficult to prove with direct evidence.” *King v. Zamiara*, 680 F.3d 686, 695 (6th Cir. 2012). Nonetheless, “bare allegations of malice” are insufficient to state a constitutional claim, as Plaintiff must instead establish “that his protected conduct was a motivating factor” behind the allegedly retaliatory action taken. *Thaddeus-X*, 175 F.3d at 399 (citations omitted). Conclusory allegations of retaliatory motive are insufficient. *See Skinner v. Bolden*, 89 Fed. Appx. 579, 579-80 (6th Cir., Mar. 12, 2004). Instead, Plaintiff must, at a minimum, allege a chronology of events from which retaliation can plausibly be inferred. *See Desmone v. Adams*, 1998 WL 702342 at *3 (6th Cir., Sep. 23, 1998); *Muhammad v. Close*, 379 F.3d 413, 417-18 (6th Cir. 2004).

On summary judgment, the causation element is analyzed under the burden-shifting framework articulated in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *See Thomas v. Eby*, 481 F.3d 434, 441-42 (6th Cir. 2007).

Plaintiff must first present evidence that his protected conduct was a motivating factor in the defendant's action. Even if Plaintiff makes this showing, Defendant is entitled to summary judgment if he demonstrates that he "would have taken the same action even without the protected activity." *Eby*, 481 F.3d at 441-42. Moreover, as the Supreme Court recently held, when alleging retaliation "it is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured – the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722 (2019).

Plaintiff alleges that Defendants searched his cell and confiscated certain legal materials and writing supplies as retaliation for previous lawsuits Plaintiff filed against other prison officials. Because Plaintiff did not submit a verified complaint or respond to the present motion, Plaintiff has failed to present *evidence* that his protected conduct in any way motivated Defendants' allegedly retaliatory conduct. This is a sufficient basis on which to grant Defendants' motion. Nevertheless, the Court will, in the alternative, assume that Plaintiff can satisfy this initial step of the analysis and proceed with the rest of the analysis.

Defendants Blow and Weaver have submitted affidavits in support of their motion for summary judgment. (ECF No. 60, PageID.806-14). Defendants' affidavits establish the following. MDOC policy requires that prison officials conduct "random, unscheduled" searches of prisoners' cells "to reduce the amount of contraband within the facilities." Blow searched Plaintiff's cell on November 16, 2016, pursuant to this policy.

Pursuant to this search, Blow confiscated certain property as contraband. With the exception of “three reams of paper,” which appeared to be legal material, all the items confiscated by Blow were confirmed to be contraband. Weaver subsequently examined more closely the “three reams of paper,” however, and determined such to constitute contraband. This determination was likewise upheld. Blow and Weaver both believed the items in question to constitute contraband. Neither Defendants’ actions were motivated in any way by Plaintiff’s litigation or grievance activities. This evidence is sufficient for Defendants to establish that they would have taken the same action even in the absence of Plaintiff’s protected conduct. Because Plaintiff has failed to respond to the present motion, or submit any other evidence on this question, Defendants are entitled to summary judgment.

CONCLUSION

For the reasons articulated herein, the undersigned recommends that Defendants’ Motion for Summary Judgment, (ECF No. 59), be granted and this matter terminated. The undersigned further recommends that appeal of this matter would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997); 28 U.S.C. § 1915(a)(3).

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

Respectfully submitted,

Date: April 23, 2020

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge